

2007

# State of Utah v. Ronald Richard Rodrigues : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee :  
v. :  
RONALD RICHARD RODRIGUES, : Case No. 20070741-CA  
Defendant/Appellant. :

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BRIEF OF APPELLANT

Appeal from Amended Restitution Order entered after judgment on August 15, 2007, the Honorable Robin Reese, Judge, Third District Court, Salt Lake County, State of Utah, presiding.

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF THE ISSUES, STANDARD OF REVIEW, PRESERVATION.....	1
TEXT OF RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.....	4
STATEMENT OF THE CASE.....	4
STATEMENT OF THE FACTS.....	5
SUMMARY OF THE ARGUMENT.....	8
ARGUMENT.....	10
POINT I. THE TRIAL COURT DID NOT HAVE JURISDICTION TO INCREASE THE RESTITUTION AMOUNT AFTER ENTERING JUDGMENT AND TRANSFERRING JURISDICTION TO THE BOARD OF PARDONS.....	10
A. The Trial Court Lacked Jurisdiction to Increase the Restitution Amount after Entering a Final Judgment that Included a Restitution Order.....	11
B. This Issue is Properly Before the Court.....	20
POINT II. THE TRIAL COURT’S VIOLATION OF THE PROTECTION AGAINST DOUBLE JEOPARDY BY INCREASING RODRIGUES’ SENTENCE WHEN IT INCREASED RESTITUTION ALSO REQUIRES THAT THE ORDER INCREASING RESTITUTION BE STRICKEN.....	22

	<u>Page</u>
A. The Trial Court’s Order Increasing Restitution After Judgment Had Been Entered and Rodrigues Began Serving His Sentence Violated the State and Federal Protections Against Double Jeopardy.....	22
B. This Court Can Review Rodrigues’ Double Jeopardy Claim.....	28
POINT III. IMPOSING AN INCREASED RESTITUTION AMOUNT IN RODRIGUES’ ABSENCE VIOLATED HIS RIGHT TO PRESENCE, ALLOCUTION AND DUE PROCESS.....	29
A. The Violation of Rodrigues’ Right to Presence, Allocution and Due Process Requires that the Restitution Order be Vacated.....	30
B. This Court Can Review This Issue on Appeal.....	33
CONCLUSION.....	34
Addendum A: Sentence, Judgment, Commitment	
Addendum B: Amended Restitution Order	
Addendum C: Relevant Statutes, Rules and Constitutional Provisions	

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<u>Alabama v. Smith</u> , 490 U.S. 794 (1989).....	23
<u>Borum v. United States</u> , 409 F.2d 433 (D.C. Cir. 1967) .....	24
<u>Bozza v. United States</u> , 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947) .....	24
<u>Decker v. Rolfe</u> , 2008 UT App 70, __ P.3d __ .....	2, 20, 21, 29
<u>Ex parte Lange</u> , 85 U.S. 163 (1873) .....	23, 24
<u>Harris v. State</u> , 413 S.E. 2d 439 (Ga. 1992) .....	26
<u>In re C.S.B.</u> , 2000 UT App 362, 17 P.3d 1131 .....	12, 13
<u>Jolley v. Jolley</u> , 2004 UT App 416 (unpublished).....	13, 14
<u>Lopez-Sanchez v. State</u> , 879 A.2d 695 (Md. 2005).....	24
<u>North Carolina v. Pearce</u> , 395 U.S. 711 (1969).....	23
<u>People v. Harman</u> , 97 P.3d 290 (Colo. Ct. App. 2004) .....	25
<u>People v. McCann</u> , 122 P.3d 1085 (Colo. Ct. App. 2005) .....	26
<u>People v. Shepherd</u> , 989 P.2d 183 (Colo. Ct. App. 1999).....	25
<u>Stanger v. Sentinel Sec. Life Ins. Co</u> , 669 P.2d 1201 (Utah 1983) .....	13, 14
<u>State in Interest of Albert Z.</u> , 517 A.2d 710 (Del. Fam. Ct. 1986).....	26
<u>State v. Alvillar</u> , 748 P.2d 207 (Utah Ct. App. 1991).....	11
<u>State v. Anderson</u> , 929 P.2d 1107 (Utah 1996) .....	30
<u>State v. Babbel</u> , 813 P.2d 86 (Utah 1991) .....	24
<u>State v. Bowers</u> , 2002 UT 100, 57 P.3d 1065.....	11
<u>State v. Burk</u> , 839 P.2d 880 (Utah Ct. App. 1992) .....	31
<u>State v. Dickey</u> , 841 P.2d 1203 (Utah Ct. App. 1992) .....	21

	<u>Page</u>
<u>State v. Dominguez</u> , 1999 Ut App 343, 992 P.2d 995.....	24, 25, 31
<u>State v. Harris</u> , 2004 UT 103, 104 P.3d 1250.....	2, 3, 23
<u>State v. Holm</u> , 2006 UT 31, 137 P.3d 726.....	2, 3
<u>State v. Houtz</u> , 714 P.2d 677 (Utah 1986).....	30, 32
<u>State v. Howell</u> , 707 P.2d 115 (Utah 1985).....	18
<u>State v. Hubbard</u> , 2002 UT 45, 48 P.3d 853.....	31
<u>State v. Lorrh</u> , 761 P.2d 1388 (Utah 1988).....	13, 14, 17
<u>State v. McGuire</u> , 2005 UT App 13 (unpublished) .....	11
<u>State v. Miller</u> , 2007 UT App 332, 170 P.3d 1141.....	2
<u>State v. Montoya</u> , 825 P.2d 676 (Utah Ct. App. 1991).....	11
<u>State v. Moya</u> , 815 P.2d 1312 (Utah Ct. App. 1991).....	8, 12, 14
<u>State v. Samora</u> , 2004 UT 79, 99 P.3d 358.....	33
<u>State v. Schofield</u> , 2002 UT 132, 63 P.3d 667 .....	2
<u>State v. Sorenson</u> , 639 P.2d 179 (Utah 1981).....	24
<u>State v. Sun Sur. Ins. Co.</u> , 2004 UT 74, 99 P.3d 818 .....	20, 21, 29
<u>State v. Telford</u> , 2002 UT 51, 48 P.3d 228.....	21, 29
<u>State v. Thorkelson</u> , 2004 UT App 9, 84 P.3d 854.....	18
<u>State v. Todd</u> , 2004 UT App 266, 98 P.3d 46, <i>rev'd on other grounds</i> , 128 P.3d 1199 ...	11
<u>State v. Wanosik</u> , 2001 UT App 241, 31 P.3d 615.....	30
<u>State v. Wanosik</u> , 2003 UT 46, 79 P.3d 937.....	18, 30, 31, 32
<u>Strickland v. State</u> , 681 So.2d 929 (Fla. Dist. Ct. App. 1996) .....	3, 23, 25, 26, 27, 29
<u>Thomas A. Paulsen Co. v. Industrial Comm'n</u> , 770 P.2d 125 (Utah 1989).....	13
<u>United States v. Burd</u> , 86 F.3d 285 (2d Cir. 1996).....	13

	<u>Page</u>
<u>United States v. DiFrancesco</u> , 449 U.S. 117 (1980) .....	24
<u>United States v. Gagnon</u> , 470 U.S. 522 (1985) .....	31
<u>Vicent v. United States</u> , 337 F.2d 891 (8 <sup>th</sup> Cir. 1964) .....	24
<u>Wilson v. State</u> , 688 N.E.2d 1293 (Ind. App. Ct. 1997).....	25

### **Statutes**

Utah Code Ann. § 76-3-201 (Supp. 2007).....	4, 21, 24, 31
Utah Code Ann. § 76-7-201 (2003) .....	4, 17
Utah Code Ann. § 77-1-6 (2003) .....	4, 22, 23, 30, 31
Utah Code Ann. § 77-27-5 (Supp. 2007).....	11
Utah Code Ann. § 77-38a-302 (Supp. 2007).....	4, 9, 10, 15, 16, 18, 19, 25, 26, 27
Utah Code Ann. § 77-7-201 (2003) .....	4
Utah Code Ann. § 78A-4-103 (2008) .....	1

### **Rules**

Utah R. Civ. P. 60(a).....	12, 13
Utah R. Crim. P. 22(a) .....	4, 18, 32, 33
Utah R. Crim. P. 22(e) .....	2, 3, 4, 11, 20, 21, 22, 28, 29, 30, 33
Utah R. Crim. P. 30(b).....	1, 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20

### **Constitutional Provisions**

U.S. Const. amend XIV .....	4, 22, 28
U.S. Const. amend. V .....	4, 22
Utah Const. art. I, sec. 7.....	32
Utah Const. art. I, sec.12.....	4, 22, 23, 30



**Other Authorities**

46 Am. Jur. 2d Judgments § 142 .....	12
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JURISDICTIONAL STATEMENT

Appellant/Defendant Ronald Richard Rodrigues timely appeals from an Amended Restitution Order issued following judgment and transfer to the Board of Pardons. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e) (2008) (formerly Utah Code Ann. § 78-2a-3(2)(e) (2002)). The original judgment is in Addendum A. The sentencing order issued by the trial court ten days after judgment is also in Addendum A. The Amended Restitution Order from which Rodrigues is appealing is in Addendum B.

STATEMENT OF THE ISSUES, STANDARD OF REVIEW, PRESERVATION

Issue I: Whether the trial court had jurisdiction pursuant to Utah Rule of Criminal Procedure 30(b) or the restitution statute to increase the amount of restitution after the court entered judgment and Rodrigues began serving his prison sentence where the state realized after sentencing that it had requested an incorrect complete restitution amount?

Standard of Review. While restitution decisions are generally reviewed for an abuse of discretion, see State v. Miller, 2007 UT App 332, ¶6, 170 P.3d 1141 (citations omitted), the question of whether a trial court has jurisdiction to increase restitution after judgment has been entered and jurisdiction has been transferred to the Board of Pardons involves a question of law. See id.; State v. Schofield, 2002 UT 132, ¶6, 63 P.3d 667; Decker v. Rolfe, 2008 UT App 70, ¶8, \_\_\_ P.3d \_\_\_. And, when a determination of “[w]hether a restitution [award] is proper . . . depends solely upon interpretation of the governing statute,” this Court applies a correction of the error standard of review. Miller, 2007 UT App 332, ¶6 (citations omitted) (alterations in original).

Preservation. Defense counsel objected to the trial court increasing the restitution amount, arguing that the trial court did not have jurisdiction. R. 127:19-20, 24, 28. This issue was therefore preserved below. Even if it had not been preserved, however, this Court could review the issue under Utah Rule of Criminal Procedure 22(e) and also because a question of jurisdiction can be raised at any time. See Utah R. Crim. P. 22(e); State v. Holm, 2006 UT 31, ¶96, 137 P.3d 726.

Issue II. Whether the trial court violated state and federal protections against double jeopardy when it increased Rodrigues’ sentence by increasing the restitution order after the trial court entered final judgment which included a final restitution order and Rodrigues had begun serving his sentence?

Standard of Review. This issue involves a question of law. See Holm, 2006 UT 31, ¶10. 137 P.3d 726; State v. Harris, 2004 UT 103, ¶¶21-24, 104 P.3d 1250.

Preservation. Defense counsel argued that the imposition of increased restitution violated due process. R. 127:19-20. This reference to due process, within the context of counsel's objection, preserved the double jeopardy argument for review. R. 127:19-20. Regardless of whether this argument preserved the issue for review, this Court can review the issue under Utah Rule Criminal Procedure 22(e) because a sentence imposed in violation of double jeopardy is an illegal sentence that must be vacated. See generally Strickland v. State, 681 So.2d 929 (Fla. Dist. Ct. App. 1996) (vacating increased restitution sentence that violated protection against double jeopardy).

Issue III: Whether the trial court violated the right to presence, allocution, and due process when it increased Rodrigues' sentence by increasing restitution outside Rodrigues' presence after the trial court entered a final judgment that included a restitution order, and transferred jurisdiction to the Board of Pardons?

Standard of Review. This issue involves a question of law. See Holm, 2006 UT 31, ¶10; Harris, 2004 UT 103, ¶¶21-24.

Preservation. Defense counsel argued that imposition of an increased restitution amount after judgment was entered and the case transferred to the Board of Pardons violated due process. R. 127:19-20. Regardless of whether this argument preserved the issue, this claim can be reviewed by this Court pursuant to Utah Rule of Criminal Procedure 22(e).

TEXT OF RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The texts of the following statutes, rules, and constitutional provision are in

Addendum C:

Utah Code Ann. § 77-38a-302 (Supp. 2007);

Utah Code Ann. § 77-1-6(2)(a) (2003);

Utah Code Ann. § 76-7-201 (2003);

Utah Code Ann. § 76-3-201(4) (Supp. 2007);

Utah R. Crim. P. 22(a) & (c);

Utah R. Crim. P. 30(b);

Utah Const. art. I, §12;

U.S. Const. amend. V & XIV

STATEMENT OF THE CASE

In an Information filed April 25, 2003, the State of Utah charged Rodrigues with two counts of criminal non-support, a third degree felony, in violation of Utah Code Ann. § 76-7-201 (2003). R. 1-5. On May 19, 2005, Rodrigues pled guilty to one count of criminal nonsupport, a third degree felony. R. 46-56. The trial court sentenced Rodrigues to prison and entered judgment on March 19, 2007. R. 80. As part of that judgment, the trial court ordered Rodrigues “to pay \$54,600 restitution through Board of Pardons.” R. 80-81. A copy of the judgment is in Addendum A.

On March 29, 2007, ten days after entering judgment, the trial court entered a sentencing order, reiterating that Rodrigues was sentenced to zero to five years at the

Utah State Prison, and also that “[a] restitution judgment in favor of the State of Utah is awarded in the amount of \$54,600 which represents child support arrears for the Defendant’s children with Jennifer Falsone and Michele Rodrigues through March 19, 2007. Restitution to be paid through the Board of Pardons.” R. 84-85. A copy of that sentencing order is in Addendum A along with the original judgment.

A month later, on April 25, 2007, the state filed a “Motion to Amend Restitution Judgment and Request for Hearing.” R. 89-91. A copy of that motion is in Addendum D. On August 15, 2007, the trial court held a hearing and granted the state’s motion. R. 107. Rodrigues was not transported from the prison for that hearing. R. 107; 127:18. The trial court entered an “Amended Restitution Order” on August 20, 2007, increasing the amount of restitution to \$65,403.66. R. 110-11. See Addendum B.<sup>1</sup>

### STATEMENT OF THE FACTS

The trial court sentenced Rodrigues on March 19, 2007 to serve zero to five years at the Utah State Prison and ordered that he “pay \$54,600 restitution through Board of Pardons.” R. 80-81. The \$54,600 court-ordered restitution was \$160 less than the complete restitution requested by the state. R. 127:4-5, 16. The court entered judgment on the day of sentencing, and Rodrigues began serving his sentence. R. 80-81.

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<sup>1</sup> The trial court record originally contained an entry at R. 114 duplicating the Amended Restitution Order but also indicating “no objection by Michael Misner, counsel for Deft” to the increased restitution amount. Appellate counsel for Rodrigues moved to correct the record and the trial court granted that motion, removing R. 114 and a “yellow stickie” found at R. 113. R. 151. The record accurately reflects that defense counsel objected to the increase in restitution following entry of judgment. R. 151.

Ten days later, on March 29, 2007, the trial court entered a Sentencing Order reiterating that Rodrigues was sentenced to serve zero to five years at the Utah State Prison. R. 85. That Sentencing Order also awarded “[a] restitution judgment in favor of the State of Utah . . . in the amount of \$54,600” and required that “[r]estitution . . . be paid through the Board of Pardons.” R. 85.

The trial court arrived at the restitution figure based on the state’s request at sentencing. R. 127:3-5. The prosecutor pointed out that although one of the criminal nonsupport counts had been dismissed, Rodrigues had “agreed to the restitution for both families.” R. 127:3. The trial judge then recited the figures that he thought were due and the prosecutor corrected those figures, stating that the restitution figure “is actually even higher.” R. 127:4. The state specifically requested restitution in the amount of \$30,680.96 on one case and \$24,078.76 on the other case. R. 127:4. The prosecutor said she could add the two figures, but the court had a calculator and arrived at the total restitution figure of \$54,760. R. 127:4-5. Defense counsel did not object to the restitution amount and the trial court subsequently ordered that Rodrigues pay \$54,600 in court-ordered restitution. R. 127:16; 80-81.

The amount requested by the state was significantly higher than the amount in the presentence report (PSR). The PSR, prepared in March 2007, indicates that Rodrigues failed to pay support to Jennifer Falsone in the amount of \$17,051 for the period of May 1, 1999 through March 31, 2004, and \$19,352 for support to Michele Rodrigues during that same period. R. 79:3. At sentencing, the trial court reviewed the PSR and apparently wrote notations regarding the amount of restitution in the margins. R. 79:3.

The plea agreement shows a different figure than the PSR. It indicates that Rodrigues agreed to pay restitution on both counts “from May 1, 1999 through the date of sentencing.” R. 53. According to the plea agreement, the total amount of restitution accrued as of the date of the plea hearing on May 19, 2005 was \$49,000.49. R. 53. The plea agreement further indicates that Rodrigues had a continuing obligation to pay an additional \$617 per month. R. 54. The plea agreement also incorporates a “Debt Computation” and indicates that “[a]n updated calculation will be provided the day of sentencing.” R. 53-54. The Debt Computation shows that through May, 2005, Rodrigues owed \$22,995.73 in restitution to Jennifer Falsone and \$26,004.76 to Michele Rodrigues, for a total of \$49,000.49. R. 37-45. The plea agreement also states that the “FIRST MONTHLY PAYMENT WILL BE DUE BY JULY 30, 2005.” R. 54 (capitalization in original).

At sentencing on March 19, 2007, the state represented to the trial court that the exact amount of restitution was \$54,760. R. 127:4-5. The court accepted the state’s representation as to the exact amount of restitution and entered judgment and commitment followed by a sentencing order indicating a civil judgment had been entered in the amount of \$54,600. R. 80-85.

After the criminal and civil judgments were entered and Rodrigues began serving his sentence, the state filed its motion to increase the restitution amount. R. 89-92. According to that motion, the state had miscalculated the amount of child support arrears owed to Michele Rodrigues. R. 90-91. The state told the court it should have requested \$34,722.70 instead of the \$24,078.76 it requested as the amount owed to Michele



Rodrigues, and that the total amount of restitution was \$65,403.66. R. 90. It attached an updated Debt Computation, showing the amount of \$34,722.70 owed Michele Rodrigues, to its motion. R. 100-04.

The trial court held a hearing on the state's motion on August 15, 2007. R. 107. Rodrigues was not present at the hearing because the trial court did not transport him from the Utah State Prison where he was serving his sentence. R. 107; 127:18. The state argued that the trial court had jurisdiction to amend the restitution order pursuant to Utah Rule of Criminal Procedure 30(b). R. 127:19. Over defense counsel's objection and in the absence of Rodrigues, the trial court increased restitution to \$65,403.66. R. 110-11. The court entered an Amended Restitution Order, which included an amendment to the restitution judgment, on August 20, 2007. R. 110-11.

### SUMMARY OF THE ARGUMENT

The trial court did not have jurisdiction to increase the restitution amount after entering a final restitution order as part of the judgment and commitment. As the trial court recognized at sentencing, jurisdiction transferred to the Board of Pardons when judgment was entered and the trial court did not retain jurisdiction to increase the restitution order.

Although the state argued that Utah Rule of Criminal Procedure 30(b) allowed the trial court to amend the restitution order after the state decided that it had requested an incorrect restitution amount, that rule did not give the court jurisdiction because Rule 30(b) "is limited to curing errors in *accurately memorializing* a judgment." State v. Moya, 815 P.2d 1312, 1317 (Utah Ct. App. 1991) (emphasis in original). Since the

judgment in this case accurately memorialized the trial court's sentencing decision, Rule 30 (b) was not applicable.

The record also demonstrates that Rule 30(b) was not applicable since the state had to present additional evidence and the court had to make a judicial decision in order to increase restitution. Because the change required judicial decision making to, among other things, determine what the correct increased amount should be, this matter could not properly be addressed pursuant to Utah Rule of Criminal Procedure 30(b).

Nor did the restitution statute, Utah Code Ann. § 77-38a-302 (Supp. 2007) give the trial court jurisdiction to increase the restitution amount. Although a provision of that statute allows a trial court to enter a restitution order up to a year after judgment in some circumstances, that provision applies only if a final restitution order is not included in the judgment. In this case where the defendant did not request a restitution hearing and the trial court entered a final order of restitution that reflected the amount requested by the state and included that order in the judgment, jurisdiction transferred to the Board of Pardons. The trial court therefore did not have jurisdiction to enter the Amended Restitution Order, requiring that it be vacated.

The amended order increasing restitution also violated the state and federal protections against double jeopardy. Because the trial court entered a final order of restitution as part of the judgment, it lost the ability to later consider the state's request that restitution be increased. As other states have recognized, increasing restitution after entry of a final sentencing order that includes a final restitution order violates double jeopardy.

The trial court also violated Rodrigues' rights to presence and allocution when it proceeded in his absence. Because Rodrigues was absent from the hearing since the court did not transport him from the prison, the state cannot establish a knowing and voluntary waiver of the right to presence. And since the state introduced additional evidence and the judge engaged in judicial decision making, Rodrigues had the right to be present. In fact, had he been present, Rodrigues might have presented information which would have convinced the court that increasing restitution was not warranted.

### ARGUMENT

#### POINT I. THE TRIAL COURT DID NOT HAVE JURISDICTION TO INCREASE THE RESTITUTION AMOUNT AFTER ENTERING JUDGMENT AND TRANSFERRING JURISDICTION TO THE BOARD OF PARDONS

The trial court lacked jurisdiction to increase the restitution amount after it entered judgment and Rodrigues began serving his sentence. Utah Rule of Criminal Procedure 30(b), which allows only the correction of mechanical errors made in memorializing a judgment, did not create trial court jurisdiction because the increase in restitution required additional evidence and judicial decision making. The restitution statute, Utah Code Ann. §77-38a-302 (Supp. 2007), also did not create jurisdiction for the trial court since that statute authorizes a court to impose restitution following judgment only in those circumstances where restitution has not previously been imposed. Because the trial court entered a final judgment that included a final restitution order, it did not have jurisdiction to subsequently increase the restitution amount.

This issue is properly before the court since Rodrigues objected below. Even if he had not objected, this Court can review this error pursuant to Rule 22(e), Utah Rules of Criminal Procedure and also because a question of jurisdiction can be raised at any time.

A. The Trial Court Lacked Jurisdiction to Increase the Restitution Amount after Entering a Final Judgment that Included a Restitution Order

Final judgment is entered in a criminal case when the trial court imposes sentence, and signs and enters the judgment. State v. Bowers, 2002 UT 100, ¶4, 57 P.3d 1065; State v. Todd, 2004 UT App 266, ¶10 n.1, 98 P.3d 46, *rev'd on other grounds*, 128 P.3d 1199. When a trial judge imposes sentence and final judgment is entered, the trial court ordinarily loses subject matter jurisdiction over the case. State v. McGuire, 2005 UT App 13, 2005 WL 67585, at \*1(unpublished); State v. Montoya, 825 P.2d 676, 679 (Utah Ct. App. 1991). Jurisdiction is transferred to the Board of Pardons when a defendant is sentenced to prison. Utah Code Ann. § 77-27-5 (Supp. 2007); State v. Alvillar, 748 P.2d 207, 209 (Utah Ct. App. 1991).

Although the trial court ordinarily loses jurisdiction over a criminal case when judgment is entered, there are exceptions that allow a trial court to take further action in a case. In this case, the state argued that Utah Rule of Criminal Procedure 30(b) allowed the court to change the amount of restitution ordered in the judgment. R. 127:19. The state's reliance on Utah Rule Criminal Procedure 30(b) was misplaced, however, because Rule 30(b) is limited to the correction of a mechanical error in memorializing a judgment and does not allow a trial court to reopen the proceedings so as to allow the introduction

of additional evidence or the exercise of further judicial decision making. See Utah R. Crim. P. 30(b); Moya, 815 P.2d at 1317.

Rule 30(b), Utah Rules of Criminal Procedure and its civil counterpart, Rule 60(a), Utah Rules of Civil Procedure, allow for the correction of inaccuracies in memorializing judgments. See Moya, 815 P.2d at 1314 n.3. Although the language of the two rules is “nearly textually identical,” Utah Rule of Criminal Procedure 30(b) is “the more appropriate vehicle” in a criminal case. Id.; Utah R. Crim. P. 30(b). Rule 30(b) states, “[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.” Utah R. Crim. P. 30(b).

The distinction between clerical errors, which can be corrected under Utah Rule of Criminal Procedure 30(b) or Utah Rule of Civil Procedure 60(a), and judicial errors, which cannot be changed under either rule, does not depend on “who made the error, but whether the error was made in rendering the judgment or in recording the judgment.” 46 Am. Jur. 2d Judgments §142 (2008)(citations omitted). The rule allows correction only when an error is made in recording a judgment; in other words, Rule 30(b) “is limited to curing errors in *accurately memorializing* a judgment.” Moya, 815 P.2d at 1317 (emphasis in original); In re C.S.B., 2000 UT App 362, ¶9, 17 P.3d 1131. A clerical error subject to correction under Utah Rule of Criminal Procedure 30(b) or Utah Rule of Civil Procedure 60(a) is an error made in the execution or recordation of a judgment whereas errors that cannot be changed under these rules are errors made by the judge in exercising discretion and rendering judgment. 46 Am. Jur. 2d Judgments §142; United States v.

Burd, 86 F.3d 285, 288 (2d Cir. 1996) (recognizing that the rule authorizes a trial court to correct only clerical errors in recording a judgment).

This Court articulated the distinction between clerical errors that can be corrected under Rule 60(a) and judicial errors which cannot be corrected under the rule in Jolley v. Jolley, 2004 UT App 416, 2004 WL 2569423 (per curiam) (unpublished).

Rule 60(a) applies only to cure errors ‘in accurately memorializing a judgment.’” *In re C.S.B.*, 2000 UT App 362, ¶ 9, 17 P.3d 1131. Clerical error “is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment.” *Stanger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201, 1206 (Utah 1983). A clerical error is one of recording “that results in the entry of a judgment which does not conform to the actual intention of the court.” *Thomas A. Paulsen Co. v. Industrial Comm’n*, 770 P.2d 125, 130 (Utah 1989). In contrast, a judicial error “is one made in rendering the judgment and results in a substantively incorrect judgment.” *Id.*

Jolley, 2004 WL 2569423, at \*1.

The Utah Supreme Court decision in State v. Lorrach, 761 P.2d 1388 (Utah 1988), illustrates the circumstances under which Rule 30(b) can be used to correct a clerical error. In Lorrach, the trial judge orally sentenced the defendant to serve a minimum mandatory term of ten years to life at the Utah State Prison. Lorrach, 761 P.2d at 1389. A substitute clerk incorrectly filled out the judgment to reflect a lighter sentence. Id. The judge’s regular clerk ultimately prepared an amended judgment that reflected the sentence the judge had orally imposed at sentencing. Id. The Supreme Court held that the amended judgment “reflected but a correction of a clerical mistake” and upheld the amended judgment even though the change had been done without a hearing or the presence of the defendant. Id. at 1390.

In addition to illustrating the application of Rule 30(b), Lorrah also clarifies that a correction made under that rule does not require a hearing or the presence of the defendant. Lorrah, 761 P.2d at 1390. This is so because the judge made his decision at the previous hearing; due process and the right to presence were served because the defendant was present and had the opportunity to present relevant information before the court reached its decision. Id. Due process and the right to presence therefore were not violated in Lorrah when the clerical error in the judgment was corrected to reflect the actual decision of the judge. Id.

Unlike Lorrah, the judge's decision in this case to impose \$65,403.66 in restitution was not made at the sentencing hearing. In fact, the judge ordered, based on the representations of the state, that Rodrigues be required to pay \$54,600 in restitution. R. 127:4-5, 16. The clerk subsequently entered judgment which correctly memorialized that order. R. 80-81, 84-85. Because the judgment memorialized the actual order of the court, the judgment did not involve an error in recording the judgment. Rather than involving an error recording the judgment, the error in this case was one that involved rendering the judgment and could not be corrected as a clerical mistake under Rule 30(b). See Moya, 815 P.2d at 1317 (stating that Rule 30(b) "is limited to curing errors in *accurately memorializing a judgment*").

The fact that the error could not be corrected from a review of the record prior to judgment further demonstrates that the trial court could not use Rule 30(b) as a vehicle for amending the judgment. See Jolley, 2004 UT App 416 (quoting Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201, 1206 (Utah 1983)) (stating that a "[c]lerical error 'is a

type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment.”) Since the state needed to submit further evidence to the court as part of the motion to amend judgment in order to establish the increased restitution amount, the error was not mechanical in nature or an error memorializing the judgment. See R. 89-104. The error therefore could not be corrected under Utah Rule of Criminal Procedure 30(b).

The nature of the error also shows that the error was not a mechanical error that could be easily corrected by a review of the record, and instead required judicial decision making. Aside from the fact that the additional amount sought by the state was not included in the record prior to judgment, the figures that are contained in the record raise a question as to what constitutes the actual figure for “complete restitution” and required judicial decision making in order to designate a “court-ordered” restitution amount. See Utah Code Ann. § 77-38a-302(5). For example, the state agreed as part of the plea bargain that on May 19, 2005, Rodrigues owed \$49,000.49 in complete restitution. R. 53. The plea agreement also shows that Rodrigues had a continuing obligation to pay \$617 per month, and agreed to pay restitution “through the date of sentencing.” R. 53-54. Even if this obligated Rodrigues to pay restitution until he was actually sentenced twenty-two months later, the judge was required to review the figures in conjunction with the plea agreement and determine an accurate amount of complete restitution; this could not be done pursuant to Utah Rule of Criminal Procedure 30(b) which allows only the correction of an error in memorializing a judgment.



Moreover, the judge was required to determine whether the \$65,403.66 sought by the state was based on an accurate assessment of required monthly payments and interest for the period between the plea and sentencing and also whether to require Rodrigues to pay interest for the twenty-two months following the plea. This required judicial decision making and the rendering of a decision, which cannot be done under Rule 30(b).

The distinction in section 77-38a-302 between “complete” and “court-ordered” restitution further demonstrates the complexity of the restitution decision and that the error in this case required judicial decision making rather than the mechanical correction of a clerical error. Utah Code Ann. §77-38a-302 makes a distinction between “complete restitution,” which is “restitution necessary to compensate a victim for all losses caused by the defendant,” and “court-ordered restitution,” which is the amount the court actually orders the defendant to pay. *Id.* Pursuant to this statute, even if the actual amount of complete restitution were \$65,403.66, the trial court nevertheless was required to determine whether to order that Rodrigues pay that full amount as court-ordered restitution. In his initial judgment, the judge did not order the full amount; instead, he ordered that Rodrigues pay \$160 less than the amount requested by the state. R. 127:4-5, 16. The state did not object to this order. R.127:16-17. Although Rodrigues agreed to pay restitution through the date of sentencing, section 77-38a-302 required the trial judge to assess whether the complete restitution was also the court-ordered restitution. This additional element of judicial decision making further demonstrates that the decision to increase the amount of restitution required the rendering of a decision and not the correction of a clerical error.

Additionally, the passage of time between the plea and sentencing demonstrates that the court was required to render a decision rather than make a mechanical correction of an error. In fact, the plea agreement shows that the parties did not anticipate that twenty-two months would pass before sentencing, and did not include details as to what would occur if sentencing were delayed. When Rodrigues agreed to pay restitution for ongoing support through the date of sentencing, the parties anticipated that sentencing would occur on July 11, 2005, about two months after the plea, and that Rodrigues would be placed on probation. R. 53-54, 66. They also agreed that Rodrigues' "FIRST MONTHLY PAYMENT WILL BE DUE ON JULY 30, 2005." R. 54 (capitalization in original). Although sentencing did not occur on July 11, 2005 because Rodrigues did not appear (see R. 66), the judge nevertheless had to decide whether to require Rodrigues to pay restitution for an additional twenty-two months, including time that Mr. Rodrigues spent in jail. See Utah Code Ann. §76-7-201(5)(a)(2003) (stating "it is an affirmative defense that the accused is unable to provide support"). Deciding whether to require Rodrigues to pay restitution for all twenty-two months following the plea hearing was an act of judicial decision making, and the judge did not have jurisdiction pursuant to Rule 30(b) to make that decision and increase the amount of restitution.

Although the increase in restitution required judicial decision making, the trial court approached the issue as if it were cognizable under Utah Rule of Criminal Procedure 30(b). Like Lorrah, the court proceeded even though Rodrigues was not transported from the prison to the hearing. R. 127:18. Unlike Lorrah, however, holding the hearing in the absence of Rodrigues was not permissible and violated his right to

presence and due process along with Utah Rule of Criminal Procedure 22(a) since the judge was considering evidence and making a decision to render a judgment imposing a harsher sentence. See State v. Wanosik, 2003 UT 46, ¶25, 79 P.3d 937 (holding that Rule 22(a) and the common law right to allocution require that a defendant be present at sentencing and afforded the right to make a statement). Due process required that the judge render his decision based on relevant and reliable information only after affording Rodrigues the right to presence and allocution. Id.; see also State v. Thorkelson, 2004 UT App 9, ¶11, 84 P.3d 854 (citing State v. Howell, 707 P.2d 115, 118 (Utah 1985)); Utah R. Crim. P. 22(a). Had Rodrigues been present, he might have been able to contribute information that would have convinced the judge not to increase the restitution. Because the judge was rendering a decision, Rule 30(b) did not authorize the procedure and the trial court erred in increasing restitution.

Nor does the language of Utah Code Ann. § 77-38a-302 (Supp. 2007) create jurisdiction for a trial court to reopen the judgment and reconsider restitution under these circumstances. Although that statute, as recently amended, allows a trial court to make restitution orders within one year of judgment when such orders are not imposed at sentencing, it does not create jurisdiction for a trial court to reopen a final judgment which includes an order imposing restitution. See Utah Code Ann. §77-38a-302(5)(d)(ii). Pursuant to its plain language, section 77-38a-302 allows a trial court to impose restitution up to one year after sentencing *only if* the court was unable to make a restitution order at the time of sentencing. Utah Code Ann. §77-38a-302(2)(b), 5(d)(i). Subsection (5)(d)(i) states in relevant part: “Except as provided in 5(d)(ii), the court shall

determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, *otherwise* within one year after sentencing.”

Utah Code Ann. § 77-38a-302(5)(d)(i) (emphasis added). This provision allowing imposition within a year of sentencing does not apply in circumstances such as these where the trial court imposed a restitution order and entered final judgment.

The trial court lost jurisdiction to increase the amount of restitution when it entered final judgment which included a final order of restitution. The court did not retain jurisdiction over the restitution issue and instead issued a subsequent order reiterating the restitution amount and ordering that it be converted to a civil judgment. Jurisdiction transferred to the Board of Pardons, as the trial court recognized when it concluded the sentencing hearing, stating:

I’ll order that you pay the sum of \$54,600 in restitution. The Board of Pardons will make an effort to collect it, you know, that may be something that’s just not going to happen given your history, but they’’ make that effort. . . . [O]nce I’ve sentenced you to prison the case becomes theirs to decide what happens thereafter, but the decision to send you to prison is mine and that’s what I’m going to do. And I’ll just order that you pay restitution.

R. 127:16-17.

The trial court was correct at sentencing when it recognized that jurisdiction over the case transferred to the Board of Pardons. Accordingly, the trial court did not have jurisdiction to subsequently enter an order increasing restitution, and the Amended Restitution Order should be vacated.

B. This Issue is Properly Before the Court

This Court can review this issue since counsel for Rodrigues objected to the trial court's lack of jurisdiction. R. 127:19-20. Even if counsel had not objected, however, this Court could review the issue pursuant to Utah Rule of Criminal Procedure 22(c) and also because a claim that a court lacked jurisdiction can be raised at any time. See Decker, 2008 UT App 70, ¶8 (citing State v. Sun Sur. Ins. Co., 2004 UT 74, ¶7, 99 P.3d 818).

Defense counsel preserved this issue by arguing that the trial court lacked jurisdiction to increase the restitution amount. R. 127:19-20. In fact, the state was aware of defense counsel's objection and addressed the jurisdictional concern before defense counsel made the objection, by arguing that the court had jurisdiction under Utah Rule of Criminal Procedure 30(b) to correct the error the state made in computing restitution.

The prosecutor stated in part:

Prosecutor: But from our [perspective] it's simply an error of – whether you want – it's an error on my part. Whether – I don't know that I'd call it clerical because I didn't – it was just picking up the wrong piece of paper from the table in court basically, and I think that the Court would be able to do it under Rule 30 for correcting general errors and things like that on the docket.

The Court: Rule 30 of the Utah Rules of Criminal Procedure?

Prosecutor: Criminal Procedure, uh-huh (affirmative).

R. 127:19. Defense counsel was then given an opportunity to state his objection.

Defense counsel: Judge, our argument would be simply that the Court no longer has jurisdiction over the case. This isn't a case where restitution was held open. A specific figure was asked for; a specific figure was granted. As far as the errors that we're talking about now, if the Court has made an error in what the court had put as the figure misreading the pre-sentence report or mis-stating numbers that we

had stated to the court. I think the court could correct its error or its clerical errors. This isn't that type of error. That's – there's two parties and if the court can correct the errors of one of the two parties in a case, I think we're running into some serious problems. So our two positions would be (1) the Court doesn't have jurisdiction to try to go back and change these things[.] I think it is a violation of due process. I think the client had his day in court and we decided these matters.

R. 127:19-20. This discussion preserved Rodrigues claim that the trial court lacked jurisdiction to increase restitution following entry of judgment.

Even if defense counsel had not objected, this Court could reach the issue under Utah Rule of Criminal Procedure 22(e). That rule states, “[t]he court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.” Utah R. Crim. P. 22(e). Illegal sentences reviewable under Rule 22(e) include sentences imposed by a court that does not have jurisdiction. State v. Telford, 2002 UT 51, ¶5, 48 P.3d 228. Since restitution is part of a criminal sentence, see Utah Code Ann. §76-3-201(4)(Supp. 2007); State v. Dickey, 841 P.2d 1203, 1209 (Utah Ct. App. 1992), the trial court imposed an illegal sentence because it lacked jurisdiction. This issue can therefore be reviewed pursuant to Rule 22(e).

Moreover, “[q]uestions of subject matter jurisdiction . . . may be raised at any time and are addressed before resolving other claims.” Decker, 2008 UT App 70, ¶8 (alterations in original) (quoting Sun Sur. Ins. Co., 2004 UT App 74, ¶7). Because questions of jurisdiction can be raised at any time, this Court reviewed the jurisdictional claim raised in Decker even though it was raised for the first time on appeal. Id.

Accordingly, this Court can review this issue because it was preserved, and even if it had not been preserved, the question of jurisdiction is reviewable under Rule 22(e) and

also because a claim that a court lacked subject matter jurisdiction can be raised at any time. Because the trial court lacked jurisdiction to increase restitution after imposing restitution at sentencing and entering final judgment, this Court should order that the amended restitution order be vacated and the original judgment remain in effect.

POINT II. THE TRIAL COURT'S VIOLATION OF THE PROTECTION AGAINST DOUBLE JEOPARDY BY INCREASING RODRIGUES' SENTENCE WHEN IT INCREASED RESTITUTION ALSO REQUIRES THAT THE ORDER INCREASING RESTITUTION BE STRICKEN.

After a trial court enters final judgment and a defendant begins serving his sentence, any increase in sentence violates the state and federal protections against double jeopardy. Since restitution is a part of sentence and a final restitution order was entered at sentencing and included in the final judgment, the increased restitution order issued in this case resulted in multiple punishments for the same offense, in violation of the state and federal protections against double jeopardy. Defense counsel's objection preserved this issue for review, but even if it did not, this Court can review the issue under Utah Rule of Criminal Procedure 22(e).

A. The Trial Court's Order Increasing Restitution After Judgment Had Been Entered and Rodrigues Began Serving His Sentence Violated the State and Federal Protections Against Double Jeopardy

The protection against double jeopardy, found in article 1, § 12 of the Utah Constitution, the Fifth Amendment to the federal constitution, applicable to the states through the Fourteenth Amendment Due Process Clause, and Utah Code Ann. §77-1-6(2)(a) (2003), protects individuals from multiple punishments for the same offense. U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice

put in jeopardy of life or limb”); Utah Const. art. I, § 12 (“nor shall any person be twice put in jeopardy for the same offense”); Utah Code Ann. § 77-1-6(2)(a) (“No person shall be put twice in jeopardy for the same offense). “If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of [this rule’s] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.” North Carolina v. Pearce, 395 U.S. 711 717-18 (1969) (alterations in original), *overruled on other grounds* Alabama v. Smith, 490 U.S. 794 (1989)) (omissions and alterations in original). “[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.” Ex parte Lange, 85 U.S. 163, 173 (1873).

Utah’s state constitutional protection against double jeopardy is “different from and provide[s] greater protection than those afforded by the United States Constitution . . . .” Harris, 2004 UT 103, ¶23. Because the Utah state constitutional protection against double jeopardy is stronger than its federal counterpart, the Utah Supreme Court has chosen to address a double jeopardy claim within the context of article 1, section 12 of the state constitution. See id. In any event, both the state constitution, with its powerful protection against double jeopardy, and the double jeopardy protection of the federal constitution, along with state statutory provisions, preclude increasing restitution after a trial court has entered judgment which includes an order of restitution, and the defendant has begun serving the sentence. See generally Strickland, 681 So.2d 929



(holding that double jeopardy is violated when a court imposes increased restitution after imposing a lawful sentence)

Double jeopardy is violated when a trial court increases a sentence after a defendant has commenced to serve it. Ex parte Lange, 85 U.S. at 176; United States v. DiFrancesco, 449 U.S. 117, 134 (1980) (citing *inter alia* Vincent v. United States, 337 F.2d 891, 894 (8<sup>th</sup> Cir. 1964), *cert. denied*, 380 U.S. 988 (1965)); Borum v. United States, 409 F.2d 433, 440-41 (D.C. Cir. 1967)). A subsequent sentence is more severe if it “exceed[s] the first in appearance or effect, in the number of its elements, or in their magnitude.” State v. Sorenson, 639 P.2d 179, 181 (Utah 1981) (internal citation omitted). Any “actual increase in permitted restitution would be an increase in punishment,” State v. Dominguez, 1999 UT App 343, ¶12, 992 P.2d 995, in violation of the protection against double jeopardy. See also Utah Code Ann. §76-3-201(4) (establishing that restitution is a part of sentence).

A sentence may be increased without violating double jeopardy when the initial sentence was illegal. See Bozza v. United States, 330 U.S. 160, 166-67, 67 S.Ct. 645, 91 L.Ed. 818 (1947) (recognizing that an illegal sentence can be corrected without violating double jeopardy); State v. Babbel, 813 P.2d 86, 88-89 (Utah 1991) (recognizing that because an illegal sentence has no legal effect, correcting it to include an increased sentence does not violate the protection against double jeopardy). Thus, if the trial court had imposed an illegal sentence, later imposing restitution might not violate double jeopardy. See Lopez-Sanchez v. State, 879 A.2d 695, 715 (Md. 2005) (Wilner, J., and Harrell, J., concurring)(citing DiFrancesco, 449 U.S. 117) (“In a criminal case, a

restitution order, unless entered as a condition of probation, is entered as a judgment that becomes part of a criminal sentence. Although Federal double jeopardy principles do not absolutely preclude a criminal sentence from being increased when authorized by statute, once such a sentence is entered, it is ordinarily final”); see also Utah Code Ann. § 77-38a-302(5)(d)(i) (indicating that a trial court “shall make all restitution orders at the time of sentencing if feasible” and allowing court to impose restitution after sentencing *only if* it was not imposed at the time of sentencing).

But when a court enters a final restitution order as part of a legal sentence, as was the case here, it cannot later amend its order to increase restitution. See Utah Code Ann. § 77-38a-302 (5)(d); see also Strickland, 681 So.2d 929 (indicating that increasing restitution after imposing a lawful sentence violates double jeopardy); Wilson v. State, 688 N.E.2d 1293, 1295 (Ind. Ct. App. 1997) (holding that the court lacked authority to amend a final restitution order after final judgment was entered). This is because any “actual increase in permitted restitution would be an increase in punishment[.]” Dominguez, 1999 UT App 343, ¶12; see also Strickland, 681 So.2d 929; Wilson v. State, 688 N.E.2d 1293.

Once a legal sentence has been imposed and a defendant has begun to serve that sentence, increasing the amount of ordered restitution violates double jeopardy. People v. Shepherd, 989 P.2d 183, 187 (Colo. Ct. App. 1999) (holding that after a legal sentence is imposed and defendant has begun serving that sentence, increasing restitution increases the sentence, in violation of the protection against double jeopardy); see also People v. Harman, 97 P.3d 290 (Colo. Ct. App. 2004) (indicating that “once a legal sentence has

been imposed and a defendant has begun serving it, an increase in the amount of restitution ordered also violates the constitutional prohibition against double jeopardy” unless the court, acting pursuant to the relevant statute, retained jurisdiction to impose restitution after entering judgment); Harris v. State, 413 S.E. 2d 439, 441 (Ga. 1992) (holding that a court cannot increase restitution after a defendant begins serving his sentence without violating protection against double jeopardy); Strickland, 681 So.2d 929 (holding that double jeopardy is violated when restitution is increased after a final sentencing order that includes restitution is entered); State in Interest of Albert Z., 517 A.2d 710 (Del. Fam. Ct. 1986) (same). It is only when the court has not yet determined the amount of restitution and the relevant statute allows imposition of restitution following sentencing, that an amended order of restitution can be imposed without violating double jeopardy. See Utah Code Ann. §77-38a-302(5) (d)(i); People v. McCann, 122 P.3d 1085, 1087-88 (Colo. Ct. App. 2005).

At the time of sentencing, the court and all parties believed that the restitution amount was final. Because restitution was considered and ordered, as required by Utah’s restitution statute, the court’s restitution order was a final sentence. The fact that the state submitted a request for an amount that it later deemed to be incorrect does not change the finality of the judgment. See Strickland, 681 So.2d at 930. As the court pointed out of in Strickland, the protection against double jeopardy precluded the trial court from altering the judgment based on the state’s error in computing restitution where the court had previously imposed a final judgment that included a final restitution order. Id.

The state argues that dental bills are properly a part of medical expenses and, since Strickland agreed to pay restitution, the imposition of additional medical expenses did not violate the constitutional prohibition against double jeopardy because it was not a sentence enhancement. We disagree. At the first sentencing hearing the state asked that restitution be made for the victim's medical bills in the specific amount of \$835. No indication was given by the state that there were any further expenses. No request was made for the court to retain jurisdiction to determine at a later time the amount of restitution Strickland would be obligated to make. It is clear from the record that everyone took the \$835 figure as the final amount. Thus, once the sentencing hearing was over, Strickland's sentence was final and the state lost its ability to request restitution for additional items.

Id.

As previously outlined in Point I, the trial court entered a final judgment when it imposed restitution, sentenced Rodrigues and entered a judgment of conviction which included the final order of restitution. Because Rodrigues did not "object[ ] to the imposition, amount, or distribution of the restitution," the trial court did not set the matter for hearing and the order imposing judgment was a final sentencing order. See Utah Code Ann. §77-38a-302(4) (Supp. 2007). Moreover, since the judge determined restitution at the time of sentencing, the provision of Utah Code Ann. §77-38a-302(5)(d)(i), which allows a court to determine restitution within a year of sentencing in circumstances where making that determination at the time of sentencing is not feasible, did not apply. Because the trial court considered and ordered restitution as required by Utah's statutes, the restitution order became final when judgment was entered and Rodrigues began serving his sentence. As was the case in Strickland, the protection against double jeopardy precluded the trial court from increasing the restitution order following sentencing. The trial court's increase in restitution following entry of final judgment and commencement of sentence violated state and federal constitutional

protections, as well as Utah's statutory protection, against double jeopardy. The amended restitution order must therefore be stricken.

B. This Court Can Review Rodrigues' Double Jeopardy Claim.

Although defense counsel stated that the increase in restitution violated due process, he did not explicitly use the words "double jeopardy." R. 127:19-20. Since the federal protection against double jeopardy applies to the states through the Fourteenth Amendment Due Process Clause, the due process objection should have alerted the trial court, especially in the context of defense counsel's argument, that the order increasing restitution violated double jeopardy. R. 127:19-20. Defense counsel stated:

Defense Counsel: Judge, our argument would be simply that the Court no longer has jurisdiction over the case. This isn't a case where restitution was held open. A specific figure was asked for; a specific figure was granted. As far as errors that we're talking about now, if the Court had made an error in what the court had put as the figure misreading the pre-sentence report or mis-stating numbers that we had stated to the court, I think the court could correct its error or its clerical errors. This isn't that type of an error. That's - - there's two parties and if the court can correct the errors of one of the two parties in a case, I think we're running into some serious problems. So our two positions would be (1) the Court doesn't have jurisdiction to try to go back and change these things[.] I think is a violation of due process. I think the client had his day in court and we decided these matters.

R. 127:19-20. This adequately informed the court that imposing a new sentence violated double jeopardy.

But even if defense counsel's objection did not preserve the double jeopardy argument, this Court can reach the issue under Utah Rule of Criminal Procedure 22(c). That rule states, "[t]he court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R. Crim. P. 22(c). Illegal sentences reviewable under

Rule 22(e) include sentences imposed by a court that does not have jurisdiction. Telford, 2002 UT 51, ¶5; Decker, 2008 UT App 70, ¶8 (quoting Sun Sur. Ins. Co., 2004 UT 74, ¶7) (holding that a claim that a court lacked jurisdiction can be raised for the first time on appeal). A claim that imposition of a second sentence violates double jeopardy is similar to a claim that a court lacked jurisdiction in that it challenges the court's authority to impose the order. Moreover, a sentence that violates double jeopardy is unlawful and must be vacated. See generally Strickland, 681 So.2d at 930 (ordering that increased restitution order entered in violation of double jeopardy be vacated). A sentence that violates the protection against double jeopardy is therefore an illegal sentence and a claim that a sentence violates double jeopardy can be raised pursuant to Rule 22(e).

Hence, even if defense counsel did not preserve this issue for review, this court is able to review the double jeopardy claim. In fact, a sentence imposed in violation of double jeopardy is not only an illegal sentence, but it is also a sentence imposed in an illegal manner since a court without authority to do so imposed a sentence in violation of constitutional protections. The double jeopardy violation in increasing Rodrigues' sentence after entry of final judgment and transfer of jurisdiction to the Board of Pardons requires that the increased restitution order be vacated.

POINT III. IMPOSING AN INCREASED RESTITUTION AMOUNT IN  
RODRIGUES' ABSENCE VIOLATED HIS RIGHT TO PRESENCE,  
ALLOCATION AND DUE PROCESS

Although the trial court's lack of jurisdiction and violation of the protection against double jeopardy should require vacation of the amended restitution order, the violation of the rights to presence, allocation, and due process also requires that the

increased restitution order be vacated. These significant constitutional and statutory violations can be reached because they were preserved below, or alternatively, pursuant to rule 22(c).

A. The Violation of Rodrigues' Right to Presence, Allocution and Due Process Requires that the Restitution Order be Vacated

Article 1, section 12 of the Utah Constitution guarantees the right to presence in a criminal case. It states, “[i]n criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . . .” Utah Const. art. I, §12. The right to presence is also codified at Utah Code Ann. § 77-1-6(1)(a) (2003).

“[D]efendants have the right to be present at all stages of the criminal proceedings against them . . . .” Wanosik, 2003 UT 46, ¶12. The Utah Supreme Court recognized the state constitutional right to presence extends to sentencing in State v. Anderson, 929 P.2d 1107, 1109-10 (Utah 1996). See also State v. Houtz, 714 P.2d 677, 678 (Utah 1986) (recognizing state constitutional right to presence in trial context). Following Anderson, this Court and the Utah Supreme Court applied the right to presence at sentencing in Wanosik, 2003 UT 46; State v. Wanosisik, 2001 UT App 241, 31 P.3d 615; and other cases. Although all of Utah’s case law discussing the right to presence does not specifically mention the state constitutional provision, its genesis is Anderson which explicitly relies on article 1, section 12 of the Utah Constitution. See Anderson, 929 P.2d at 1109-10 (citing article 1, section 12 as the basis for the right to presence); Wanosik, 2003 UT 46, ¶12 (relying on Anderson in recognizing a right to presence at sentencing). These cases establish that a defendant has a state right to presence and allocution at

sentencing. Since sentencing includes the imposition of restitution, see Dominguez, 1999 UT App 343, ¶12; Utah Code Ann. § 76-3-201(4), the rights to presence and allocution extend to any hearing where a court determines restitution. See Utah Code Ann. §77-1-6(1)(a); Wanosik, 2003 UT 46, ¶¶12-19.

Federal due process also guarantees the right to presence. See State v. Hubbard, 2002 UT 45, ¶33 n. 7, 48 P.3d 853. That right “is rooted in the Confrontation Clause, [and] further protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence.” Id. (citing United States v. Gagnon, 470 U.S. 522, 526 (1985)); see also State v. Burk, 839 P.2d 880, 887 (Utah Ct. App. 1992). Under the federal protection, a defendant has a due process right to be present ““whenever his presence has a relation, reasonably substantial to the fullness of his opportunity to defend against the charge . . . . [The] presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”” Hubbard, 2002 UT 45, ¶33 n.7 (quoting Gagnon, 470 U.S. at 526 (citation omitted))(omissions and alterations in original).

The right to presence applies in this case where the state presented evidence in support of its request that the judge increase restitution at the post-judgment hearing. Rodrigues’ presence would not only have furthered justice and fairness by allowing Rodrigues to see and hear the reasons for the increase, but also would have allowed Rodrigues to give the trial court input about the amount of time he had spent in jail and any reasons for failing to appear for sentencing when it was originally scheduled, which



may have impacted on the judge's decision as to whether to award complete restitution as court-ordered restitution.

Although a defendant has the right to presence at sentencing, that right can be waived. Wanosik, 2003 UT 46, ¶¶12-13 (citing Houtz, 714 P.2d at 678). Any waiver of the right to presence must be knowing and voluntary. Wanosik, 2003 UT 46, ¶15. The burden of proof is on the prosecution. Id. In this case, the state cannot sustain the burden of establishing a knowing and voluntary waiver of the right to presence. Rodrigues was in prison and the trial court simply failed to transport him to the proceedings. R. 107; 127:18. Because Rodrigues did not waive his right to presence, that right was violated when the trial court conducted hearing at which it accepted the state's representations regarding the amount of restitution due and increased the restitution award.

Moreover, by depriving Rodrigues of his right to presence, the trial court also deprived him of his right to allocution. See Wanosik, 2003 UT 46, ¶19. Article 1, section 7 of the Utah Constitution requires that sentencing be based on reliable and relevant information. Id. Allocution by a defendant, along with arguments by counsel, serve to fulfill this due process requirement as well as the requirements of Utah Rule of Criminal Procedure 22(a). Id. By conducting the hearing in the absence of Rodrigues, who was being held at the prison, the trial court deprived Rodrigues of his right to presence and allocution, and also denied him due process by failing to give him the opportunity to speak and present reliable and relevant information. Had Rodrigues been present, he may have had an explanation as to why he had not appeared at sentencing or may have been able to provide information about his inability to pay restitution. At the

very least. he could have informed the court that he had been jailed for a portion of the twenty-two months or presented other information that might have convinced the court that the increase in restitution was not warranted.

Because the trial court violated Rodrigues' right to allocution and presence, the Amended Sentencing Order should be vacated.

B. This Court Can Review This Issue on Appeal.

Defense counsel argued that the hearing violated due process. R. 127:19-20.

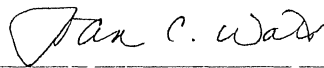
Although the context of this argument suggests at the very least that the action violated the protection against double jeopardy, it also should have alerted the trial court that Rodrigues' right to a full and fair hearing in his presence was being violated. Regardless of whether this objection preserved the issue for review, this claim nevertheless can be reviewed pursuant to Utah Rule of Criminal Procedure 22(e).

A sentence imposed in violation of Utah Rule of Criminal Procedure 22(a), due process or the right to presence and allocution is an illegal sentence that can be reviewed under Utah Rule of Criminal Procedure 22(e). State v. Samora, 2004 UT 79, ¶13, 99 P.3d 358. This means that a violation of due process or Rule 22(a) error in imposing restitution can be reviewed pursuant to Rule 22(e). Id. at ¶5, 13. In fact, a sentence that is imposed outside the presence of the defendant and without the opportunity for allocution is a sentence imposed in an illegal manner. See Utah R. Crim. P. 22(e). In this case where the trial court conducted a hearing, accepted evidence and rendered a decision, the sentence was imposed in violation of Mr. Rodrigues' state constitutional right to presence and due process, and must be vacated.

CONCLUSION

Appellant/Defendant Ronald Richard Rodrigues respectfully requests that this Court vacate the Amended Restitution Order.

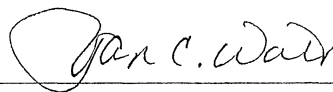
SUBMITTED this 5<sup>th</sup> day of May, 2008.



\_\_\_\_\_  
JOAN C. WATT  
MICHAEL MISNER  
Attorneys for Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Court of Appeals, 450 South State, 5<sup>th</sup> Floor, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 5<sup>th</sup> day of May, 2008.



DELIVERED this \_\_\_\_ day of May, 2008.

\_\_\_\_\_

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 031902822 FS
	:	
RONALD RICHARD RODRIGUES,	:	Judge: ROBIN W. REESE
Defendant.	:	Date: March 19, 2007

*SA-11-166606*

---

PRESENT

Clerk: marlened

Prosecutor: ROZYCKI, ANN C

Defendant

Defendant's Attorney(s): MISNER, MICHAEL D

DEFENDANT INFORMATION

Date of birth: January 23, 1970

Video

Tape Number: TAPE Tape Count: 11:33

CHARGES

1. CRIMINAL NONSUPPORT - 3rd Degree Felony

Plea: Guilty - Disposition: 05/19/2005 Guilty

SENTENCE PRISON

Based on the defendant's conviction of CRIMINAL NONSUPPORT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 031902822  
Date: Mar 19, 2007

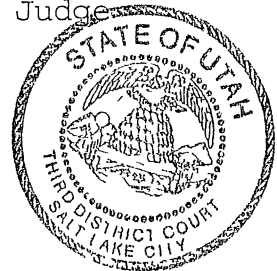
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SENTENCE RECOMMENDATION NOTE

COURT ORDERED DEFT TO PAY \$54,600.00 RESTITUTION THROUGH BOARD OF  
PARDONS

Dated this 19 day of March, 2007.

  
\_\_\_\_\_  
ROBIN W. REESE  
District Court Judge



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JUDICIAL  
SALT LAKE COUNTY  
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**ANN ROZYCKI #7609**

Assistant Attorney General  
MARK SHURTLEFF #4666  
ATTORNEY GENERAL  
Attorneys for the Plaintiff  
160 East 300 South  
P.O. Box 140814  
Salt Lake City, Utah 84114-0814  
Telephone: (801) 366-0199

**IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT**

STATE OF UTAH,  Plaintiff,  v.  RONALD RICHARD RODRIGUES  Defendant.	<b>SENTENCING ORDER</b>  Criminal No. 031902822FS  Judge: ROBIN W. REESE
--	--

This matter came on for sentencing before the Honorable Robin W. Reese, Judge presiding, on March 19, 2007. The State of Utah was present and represented by Ann Rozycki, Assistant Attorney General and the Defendant was present and represented by Michael D. Misner of Salt Lake Legal Defenders Association. The Defendant previously pled guilty to Count I of the Information, Criminal Non-Support, a Third Degree Felony, pursuant to Utah Code Annotated Section 76-7-201 (1953, as amended) on May 19, 2005. The State agreed

to dismiss Count II of the Information. Based upon the Defendant's plea of guilty and good cause appearing,

**IT IS HEREBY ORDERED AS FOLLOWS:**

1. The Defendant is sentenced to an indeterminate term of 0 - 5 years in the Utah State Prison, commitment to begin forthwith.

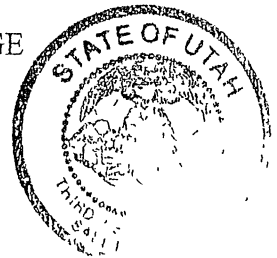
2. A restitution judgment in favor of the State of Utah is awarded in the amount of \$54,600.00 which represents child support arrears for the Defendant's children with Jennifer Falsone and Michele Rodriguez through March 19, 2007. Restitution to be paid through the Board of Pardons.

DATED this 29 day of March, 2007.

BY THE COURT:



ROBIN W. REESE  
DISTRICT COURT JUDGE



**ANN ROZYCKI, #7609**

Assistant Attorney General

MARK L. SHURTLEFF #4666

Attorney General

160 East 300 South

PO BOX 140814

Salt Lake City, Utah 84114-0814

Telephone. (801) 366-0199

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By [Signature]  
CLERK

**IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
SALT LAKE DEPARTMENT, STATE OF UTAH**

STATE OF UTAH,	
Plaintiff,	<b>AMENDED RESTITUTION ORDER</b>
v.	Criminal No. 031902822FS
RONALD R. RODRIGUES,	JUDGE: ROBIN W. REESE
Defendant.	

This matter came on for hearing on the State's Motion to Amend Restitution Judgment and Request for Hearing. The State was present and represented by Ann Rozycki, Assistant Attorney General. The Defendant was not transported from the Utah State Prison, but was represented by Michael D. Misner, Salt Lake Legal Defender Association. Having heard from the parties and good cause appearing, IT IS HEREBY ORDERED AS FOLLOWS:

1. The restitution judgment in favor of the State of Utah previously ordered in this case on March 19, 2007, is hereby amended to reflect the total amount of \$65,403.66 to be distributed as follows:

To Michelle Rodrigues

\$34,722.70



To Jennifer Falsone \$19,778.44

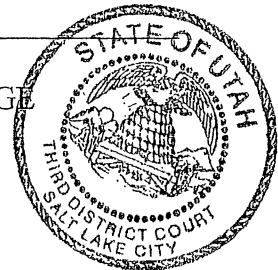
To State (for public assistance provided  
to Jennifer Falsone \$10,902.52

2. The Defendant's is granted 30 days from August 16, 2007, to file a Motion to  
Withdraw his guilty plea if he believes he has a basis to do so.

Dated this 20 day of Sept  
Oct, 2007  
Aug.

*Robin W. Reese*

ROBIN W. REESE  
DISTRICT COURT JUDGE



**Utah Code Ann. § 77-38a-302 (Supp. 2007)**

**§ 77-38a-302. Restitution criteria**

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.

(5)(a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

- (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
  - (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
  - (iii) the cost of necessary physical and occupational therapy and rehabilitation;
  - (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;
  - (v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and
  - (vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.
- (c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b) and:
- (i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;
  - (ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
  - (iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and
  - (iv) other circumstances which the court determines may make restitution inappropriate.
- (d)(i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.
- (ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.
- (e) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

**Utah Code Ann. § 77-1-6 (2003)**

**77-1-6 Rights of defendant.**

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

**Utah Code Ann. § 76-7-201 (2003)**

**76-7-201 Criminal nonsupport.**

(1) A person commits criminal nonsupport if, having a spouse, a child, or children under the age of 18 years, he knowingly fails to provide for the support of the spouse, child, or children when any one of them:

(a) is in needy circumstances; or

(b) would be in needy circumstances but for support received from a source other than the defendant or paid on the defendant's behalf.

(2) Except as provided in Subsection (3), criminal nonsupport is a class A misdemeanor.

(3) Criminal nonsupport is a felony of the third degree if the actor:

(a) has been convicted one or more times of nonsupport, whether in this state, any other state, or any court of the United States;

(b) committed the offense while residing outside of Utah; or

(c) commits the crime of nonsupport in each of 18 individual months within any 24-month period, or the total arrearage is in excess of \$10,000.

(4) For purposes of this section "child" includes a child born out of wedlock whose paternity has been admitted by the actor or has been established in a civil suit.

(5) (a) In a prosecution for criminal nonsupport under this section, it is an affirmative defense that the accused is unable to provide support. Voluntary unemployment or underemployment by the defendant does not give rise to that defense.

(b) Not less than 20 days before trial the defendant shall file and serve on the prosecuting attorney a notice, in writing, of his intention to claim the affirmative defense of inability to provide support. The notice shall specifically identify the factual basis for the defense and the names and addresses of the witnesses who the defendant proposes to examine in order to establish the defense.

(c) Not more than ten days after receipt of the notice described in Subsection (5)(b), or at such other time as the court may direct, the prosecuting attorney shall file and serve the defendant with a notice containing the names and addresses of the witnesses who the state proposes to examine in order to contradict or rebut the defendant's claim.

(d) Failure to comply with the requirements of Subsection (5)(b) or (5)(c) entitles the opposing party to a continuance to allow for preparation. If the court finds that a party's failure to comply is the result of bad faith, it may impose appropriate sanctions.

**Utah Code Ann. § 76-3-201 (Supp 2007)**

**§ 76-3-201. Definitions--Sentences or combination of sentences allowed-- Civil penalties--Hearing**

(1) As used in this section:

(a) "Conviction" includes a:

(i) judgment of guilt; and

(ii) plea of guilty.

(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

(c)(i) "Victim" means any person who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

(a) to pay a fine;

(b) to removal or disqualification from public or private office;

(c) to probation unless otherwise specifically provided by law;

(d) to imprisonment;

(e) on or after April 27, 1992, to life in prison without parole; or

(f) to death.

(3)(a) This chapter does not deprive a court of authority conferred by law to:

(i) forfeit property;

(ii) dissolve a corporation;

(iii) suspend or cancel a license;

- (iv) permit removal of a person from office;
  - (v) cite for contempt; or
  - (vi) impose any other civil penalty.
- (b) A civil penalty may be included in a sentence.

(4)(a) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to the victims, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement.

(b) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act.

(5)(a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:

- (i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;
- (ii) charged with a felony or a class A, B, or C misdemeanor; and
- (iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:

- (i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or
- (ii) the defendant was not transported pursuant to a court order.

(c)(i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:

- (A) \$75 for up to 100 miles a defendant is transported;
- (B) \$125 for 100 up to 200 miles a defendant is transported; and
- (C) \$250 for 200 miles or more a defendant is transported.

(ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.

(d) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.

(6)(a) In addition to any other sentence the court may impose, and unless otherwise ordered by the court pursuant to Subsection (6)(c), the defendant shall

pay restitution to the county for the cost of incarceration in the county correctional facility before and after sentencing if:

(i) the defendant is convicted of criminal activity that results in incarceration in the county correctional facility; and

(ii)(A) the defendant is not a state prisoner housed in a county correctional facility through a contract with the Department of Corrections; or

(B) the reimbursement does not duplicate the reimbursement provided under Section 64-13e-104 if the defendant is a state probationary inmate, as defined in Section 64-13e-102, or a state parole inmate, as defined in Section 64-13e-102.

(b)(i) The costs of incarceration under Subsection (6)(a) are the daily inmate incarceration costs and medical and transportation costs for the county correctional facility.

(ii) The costs of incarceration under Subsection (6)(a) do not include expenses incurred by the county correctional facility in providing reasonable accommodation for an inmate qualifying as an individual with a disability as defined and covered by the federal Americans with Disabilities Act of 1990, 42 U.S.C. 12101 through 12213, including medical and mental health treatment for the inmate's disability.

(c) In determining whether to order that the restitution required under this Subsection (6) be reduced or that the defendant be exempted from the restitution, the court shall consider the criteria under Subsections 77-38a-302(5)(c)(i) through (iv) and shall enter the reason for its order on the record.

(d) If on appeal the defendant is found not guilty of the criminal activity under Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall reimburse the defendant for restitution the defendant paid for costs of incarceration under Subsection (6)(a).



## **Utah R. Crim. P. 22(a)**

### **Rule 22. Sentence, judgment and commitment.**

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

**Utah R. Crim. P. 22(e)**

**Rule 22. Sentence, judgment and commitment.**

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

## **Utah Rules of Criminal Procedure 30(b)**

### **Rule 30. Errors and defects.**

(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.

## **Utah Const. art. I, sec. 12**

### **Article I, Section 12. [Rights of accused persons.]**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

## **U.S. Const. amend. V**

### **Amendment 5 - Trial and Punishment, Compensation for Takings. Ratified 12/15/1791.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## U. S. Constitution Amendment XIV

### **Amendment 14 - Citizenship Rights. Ratified 7/9/1868.**

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.